formulate them in the reference. Suffice it for these items to be formulated by the parties themselves when they go before the tribunal. That is the meaning and effect of regulation 8.

Lastly, it was said that the company was not bound by the union membership check as it had no opportunity to verify the union books. The company claimed that only 20 per cent. of its workmen were union members. That, in my opinion, is begging the question of recognition. The question here is plain, and that is whether there is a trade dispute. It seems to me that there is a trade dispute. The company did not see fit to grant recognition to the union as representative of its members and therefore a dispute exists. The dispute has been referred to the Minister by a trade union representing the workmen members and therefore the Minister has power to refer it to the tribunal.

For these reasons the motion is dismissed with costs.

Motion dismissed.

Solicitors: *N. Sharma; R. Rajasingam & Co.*

D. E. LTD. v. COMPTROLLER OF INCOME TAX

[O.C.J. (Gill J.) June 26, 1967]
[K.L. — Civil Appeal No. 4 of 1966]

Income Tax — Notices of assessments — Refusal of comptroller to amend — Appeal to Income Tax Board of Review — Requirement of security — Failure to furnish and consequences — Failure to provide security no bar to appeal — Income Tax Ordinance, 1947, ss. 75(1) & 76(9) — Effect of repeal of s. 81 and amendment of s. 82 upon s. 76(9).

By a notice of assessment dated October 9, 1964 the Comptroller of Income Tax assessed the appellants for income tax for the years of assessment 1962 and 1963. On November 5, 1964 the appellants applied to the comptroller for the two assessments to be reviewed and revised. On the refusal by the comptroller on February 17, 1965 to amend the two assessments, the appellants lodged an appeal to the Income Tax Board of Review under section 75(1) of the Income Tax Ordinance. On July 8, 1965 the board, on the application of the comptroller, made an order under section 76(9) of the Ordinance requiring the appellants to furnish security in the sum of $20,000 within one week and adjourned the hearing of the appeal to August 18, 1965. The appellants having failed to furnish the security as ordered, the board, when the appeal came on for hearing on August 18, 1965, ruled that, as the appellants had failed to furnish security, it could not proceed with the hearing of the appeal and that the appeal was deemed to be withdrawn.

An appeal was lodged to the High Court against the decisions of the board. The main ground of appeal was that the board has no power to dismiss an appeal or to deem it as withdrawn because of failure to comply with an order for security made under section 76(9) of the Ordinance.

Held: (1) the effect of the repeal of section 81 and amendment of section 82 is that an appeal to the board now no longer puts the tax in abeyance because payment of the tax within one month of the service of the notice of assessment is required notwithstanding. The provision for security under section 76(9) pending appeal in practice become superflous and unnecessary because the comptroller can commence proceedings for recovery of the tax after the lapse of one month as he did in this case;

(2) failure to provide security is no bar to hearing of the appeal. The assumption that security under section 76(9) is security for prosecution of the appeal is wrong and it does not mean that appeal is at an end if security is not provided. The board will be directed to hear the appeal.

INCOME TAX APPEAL.

K. Rajanayagam for the appellants.

Wan Hamzah bin Salleh (Federal Counsel) for the respondent.

Cur. Adv. Vult.

Gill J.: By a notice of assessment dated 9th October, 1964 the Comptroller of Income Tax assessed the appellants for income tax for the years of assessment 1962 and 1963. On 5th November, 1964 the appellants applied to the comptroller for the two assessments to be reviewed and revised. On the refusal by the comptroller on 17th February, 1965 to amend the two assessments, the appellants lodged an appeal to the Income Tax Board of Review under section 75(1) of the Income Tax Ordinance, 1947 on 20th February, 1965. On 8th July, 1965 the board, on the application of the comptroller, made an order under section 76(9) of the Ordinance requiring the appellants to furnish security in the sum of $20,000 within one week and adjourned the hearing of the appeal to 18th August, 1965. The appellants having failed to furnish the security as ordered, the board, when the appeal came on for hearing on 18th August, 1965, ruled that, as the appellants had failed to furnish security, it could not proceed with the hearing of the appeal and that the appeal was deemed to be withdrawn. The appellants have now appealed to this court against the decisions of the board given on 8th July, 1965 and on 18th August, 1965.

The main ground of appeal to this court is that the board has no power to dismiss an appeal or to deem it as withdrawn because of the failure of an appellant to comply with an order for security made under section 76(9) of the Ordinance, which reads as follows:—

> "Notwithstanding anything contained in section 82 of this Ordinance, the board may, on the application of the comptroller made at any time after notice of appeal has been given, require the appellant to furnish security, in such sum and within such time as may be specified, for payment of tax, and if security is not furnished in the sum and within the time specified, the tax assessed by the comptroller shall become payable and recoverable forthwith."

For reasons which will be clear from my judgment, it is relevant to consider section 82 of the Ordinance as amended by the Income Tax

(Amendment) Act, 1960, which also repealed section 81 of the Ordinance. Section 82 of the Ordinance as amended reads as follows:—

"Subject to the provisions of section 87 of this Ordinance, tax for any year of assessment levied in accordance with the provisions of section 38 or 39 of this Ordinance shall, notwithstanding any objection or appeal against the assessment on which such tax is levied, be payable at the place stated in the notice given under section 72 of this Ordinance within one month after the service of such notice:

Provided that—

(a) where collection of tax has remained in abeyance pending the determination of any objection or appeal against an assessment made prior to the first day of January, 1960, such tax shall be payable not later than the first day of September, 1960;

(b) the comptroller in his discretion may extend the time limit within which payment is to be made."

Section 81 of the Ordinance before its repeal in 1960 read as follows:—

"Collection of tax shall, in cases where notice of an objection or an appeal has been given, remain in abeyance until such objection or appeal is determined:

Provided that the comptroller may in any such case enforce payment of that portion of the tax, if any, which is not in dispute."

Section 82, before it was amended in 1960 read as follows:—

"Subject to the provisions of sections 81 and 87 of this Ordinance, tax for any year of assessment levied in accordance with section 38 or 39 of this Ordinance shall be payable at the place stated in the notice of assessment under section 72 of this Ordinance within one month after the service of such notice:

Provided that the comptroller in his discretion may extend the time within which payment is to be made."

It is to be observed that prior to the repeal of section 81 and the amendment of section 82 in 1960, on a notice of appeal being lodged against the assessment of income tax, collection of tax remained in abeyance until the appeal was determined, unless in the meantime an order for security was made under section 76(9) of the Ordinance and the appellant failed to furnish security within the time specified. In other words, the effect of non-compliance with an order for security under section 76(9) of the Ordinance was to nullify the effect of section 81 of the Ordinance and to make the tax assessed by the comptroller payable and recoverable forthwith.

Since the repeal of section 81 and the amendment of section 82 of the Ordinance an appeal to the board no longer serves as a stay of execution so to speak, because under section 82 of the Ordinance as amended, notwithstanding the appeal, tax become payable within one month after service of the notice of assessment under section 72 of the Ordinance. Thus, section 76 (9) and section 82 of the Ordinance both contain provisions under which income tax becomes payable and recoverable notwithstanding an appeal. Indeed, the effect of section 82 of the Ordinance as amended is to make it unnecessary for an order for security to be made under section 76(9) of the Ordinance, since such an order can only be made on the lodging of an appeal with the board and as income tax is likely to become payable under the provision of section 82 as amended before the non-compliance of an order under section 76(9) of the Ordinance. In the circumstances it seems to me that to all intents and purposes section 76(9) of the Ordinance has now become a dead letter.

It was argued on behalf of the comptroller that, in making the order that the appeal was deemed to have been withdrawn, the board accepted the procedure followed by the courts where security is not furnished. The fallacy of this argument lies in the assumption that an order for security under section 76(9) is security for the prosecution of the appeal. To my mind, there is no basis for such assumption. There is no provision in the Ordinance, so far as I can see, for the appellant to furnish security as a condition for his prosecuting the appeal. There is certainly no such provision in section 76(9) itself. This section mentions the consequence of failure to furnish security and it is not possible to read into it any other consequence. It certainly cannot be extended to mean that the appeal shall be at an end if security is not furnished.

In the present case the comptroller had already filed an action in the High Court to recover the income tax from the appellants, there being no impediment against his bringing such action in the High Court because of the provisions of section 82 of the Ordinance. In the circumstances an order under section 76(9) for security to be furnished, to my mind, served no purpose and was indeed nugatory. As I have already indicated, with the repeal of section 81 of the Ordinance and the amendment of section 82 of the Ordinance, section 76(9) has lost its usefulness. The order for security here served no purpose when the comptroller had already taken steps to recover the income tax. If the application for security was made so as to put an end to the appeal if security was not furnished, then it was misconceived, because it seems clear to me that failure to provide security is no bar to an appeal.

For the reasons I have stated, I would allow this appeal, set aside the orders of the board appealed against and direct that the board do proceed to hear the appeal. The respondent must pay the costs of the appeal.

Appeal allowed.

Solicitors: *Rajanayagam & Liew.*

MLJ 2005